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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 454

AARON SUSSMAN and HARRY D. NASSAU,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Aaron Sussman and Harry D. Nassau, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on August 21, 1959.

Opinion Below

The opinion of the Court of Appeals in this case has not yet been reported. This opinion is set forth as an Appendix hereto, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on August 21, 1959. On September 17, 1959, Mr. Justice William J. Brennen, Jr., granted an order extending the time of petitioners to file their petition for writ of certiorari

to and including October 5, 1959. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

The questions presented in this case relate to the following:

1. Whether there was a material and prejudicial variance between the indictment which alleged a single continuous conspiracy and the proof showing multiple conspiracies and whether there was a conflict between the decision of the Court in this case and the decision of the Court of Appeals for the Second Circuit in the case of *United States* v. *Russano*, 257 F. 2d 712.

2. Whether the failure to record and transcribe the grand jury proceedings resulting in this indictment was prejudicial to petitioners' rights, in light of the fact that none of the government's witnesses gave evidence against petitioners before the grand jury, and whether the failure to raise this question by pre-trial motion constituted a waiver thereof, in light of the decision of this Court in *Costello* v. *United States*, 350 U. S. 359.

3. Whether the evidence of petitioners' guilt was legally sufficient where the two principal government witnesses against them substantially contradicted each other on direct material matters.

4. Whether the denial of petitioners' pre-trial motions materially prejudiced their rights; whether the trial judge's charge to the jury was fair and correct, after petitioners' requests to charge on material matters was denied and after their exceptions to portions of the charge were noted, without appropriate correction; and whether the practice of

the trial judge in permitting government witnesses on direct examination to testify to conclusions and to give self-serving reasons for their actions, considered in sum, deprived petitioners of a fair trial.

Constitutional Provision, Statutes and Rules Involved

The following Constitutional and Statutory provisions and Rules of Criminal Procedure are involved in this case:

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * * nor be deprived of life, liberty or property, without due process of law * * *

TITLE 18, UNITED STATES CODE

Section 371. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 641. *Public money, property or records.*

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—shall be fined not more than $10,000 or imprisoned not more than ten years, or both, but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 6. *The Grand Jury*

(d) *Who May Be Present.* Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer may be present while the grand jury is in session; but no person other than the jurors may be present while the grand jury is deliberating or voting.

(e) *Secrecy of Proceedings and Disclosure.* Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or given bail, and in that event the clerk shall seal the indictment and no person shall disclose

the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

Rule 7. *The Indictment and the Information.*

(f) *Bill of Particulars.* The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires.

Rule 12. *Pleadings and Motions before Trial; Defenses and Objections.*

(b) *The Motion Raising Defenses and Objections.*

(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

Rule 16. *Discovery and Inspection.*

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers,

documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

Rule 33. *New Trial.*

The court may grant a new trial to a defendant if required in the interest of justice * * * A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

STATEMENT OF THE CASE

The Indictment

The indictment in this case contains forty counts. Count 1 contains the conspiracy count, with the remaining 39 counts containing various substantive charges against various defendants, charging either the theft or the knowing receiving of stolen government property.

The conspiracy count alleged a single continuous criminal conspiracy commencing on or about January 6, 1950 "and continuously thereafter up to and including March 15, 1956 in the Eastern District of Pennsylvania and elsewhere" (4a)[1], among the defendants Labate, Ballard, Kesting, Deering, Nonnemacher, Sussman, Nassau, Chamberland, Chor-

[1] All numbers in parentheses refer to pages in the Consolidated Appendix for Appellants, unless otherwise indicated.

ney and Spalazzo, and co-conspirators; but not named as defendants, Martin Monroe Weiner, William Weiner, Robert D. Lichtman, David H. Stolper and Isaac Sachs. The object of this criminal conspiracy was to violate Title 18, United States Code, Section 641.

The pleading paragraphs of the conspiracy count alleged a plan and purpose "to steal, purloin and convert to their own use—property of the United States from the Philadelphia Quartermaster Depot (consisting of) cloth for the manufacture of uniforms, and to receive, conceal and retain said stolen property with intent to convert to their own use and to the use of others" (4a). Government employees Labate, Ballard, Kesting, Deering, Spalazzo and Nonnemacher would aid and abet Martin Monroe Weiner, William Weiner, David H. Stolper and Robert D. Lichtman to steal said cloth and to make necessary arrangements to accomplish these thefts. Then Lichtman, both Weiners, Stolper, Sachs and Chamberland would arrange for the storage and the ultimate sale and disposition of the stolen cloth (5a). As to defendants Sussman and Nassau (the petitioners herein) and Harry Chorney, the sole pleading paragraph referring to them states:

> "It was also an essential part of the conspiracy that AARON SUSSMAN, HARRY NASSAU and HARRY CHORNEY would purchase and receive the uniform cloth stolen from the Philadelphia Quartermaster Depot, and arrange for the subsequent sale and distribution of the stolen cloth to other persons in New York City, N.Y., and divers other places" (5a).

The overt acts pleaded against the defendants and co-conspirators charged essentially thefts by the government employees falling into two separate categories: Thefts with Martin Weiner on various dates commencing February 17,

1954, continuing through March 14, 1956 (Overt Act 4) (6a), and with David Stolper on various dates commencing May 19, 1953 continuing through August 11, 1955 (Overt Act 6) (6a-7a). In each of these Overt Acts, defendant Spalazzo is named as participating. As to Sussman and Nassau, apart from allegations of meeting, they are charged together with receiving stolen cloth on February 17, 1954, March 8, 1954, April 26, 1954, May 18, 1954, June 23, 1954, August 20, 1954, July 19, 1955, October 31, 1955, November 25, 1955, January 17, 1956, February 16, 1956 and March 14, 1956 (Overt Act 5) (6a).

Of the 39 substantive counts, defendant Sussman is named as a receiver of stolen government cloth in 13 counts, counts 3, 5, 7, 9, 11, 13, 19, 21, 23, 25, 27, 29 and 31. Defendant Nassau is named as a receiver in 8 substantive counts, counts 13, 19, 21, 23, 25, 27, 29 and 31. None of these counts relates to a corresponding theft count involving David Stolper (which includes Spalazzo), but rather always a theft count involving Martin Weiner.

Although in Overt Act 5 of the conspiracy count defendant Harry Nassau is charged with having received with Sussman stolen cloth, on or about February 17, 1954, March 8, 1954, April 26, 1954, May 18, 1954 and June 23, 1954, nevertheless Nassau is not named as a defendant in the corresponding substantive counts (counts 3, 5, 7, 9 and 11).

With respect to this entire indictment, attention is invited to the indictment in the companion case of Indictment No. 19132, filed February 21, 1957, in the same district court. This indictment, referred to throughout the trial of this case, is reprinted at pp. 874a-897a of the Consolidated Appendix for Appellants.

The Record

The record in this case before the Court of Appeals consisted of a Consolidated Appendix for Appellants, although the complete typewritten record of the trial in the District Court for the Eastern District of Pennsylvania was filed in the Office of the Clerk of the Court of Appeals. The printed Consolidated Appendix comprised approximately 900 pages. This Appendix has been certified and is submitted to this Court for use in connection with this case; and 2 copies of said printed Appendix have also been filed with the Court for like use. The government did not file any separate Appendix in the Court of Appeals.

Pre-Trial Proceedings

In advance of trial and within the time limits fixed by the district judge before whom the pleas were entered, petitioners Sussman and Nassau filed pre-trial motions for various relief (27a-32a). In brief, these motions were for (1) a bill of particulars under Rule 7(f), F. R. Cr. P., as to the various counts of the indictment in which each was named (27a-28a); (2) for an order dismissing Count 1 of the indictment (the conspiracy count) under Rule 12(b)(2), F. R. Cr. P., "on the ground that said count is improper and unlawful in said indictment, in that it constitutes an improper and unlawful pleading by the fragmentation, division and separation of a single conspiracy being charged in two separate indictments, in this Count, to wit, this indictment and Count 1 of Indictment No. 19132 filed February 21, 1957." (28a); and (3) for discovery and inspection, under Rule 16, F. R. Cr. P., of various documentary materials (29a).

All motions were denied by Judge Lord on February 26, 1958, without any statement, memorandum or opinion being filed or rendered by him.

It should be noted here that the defendants named in Indictment No. 19132 were not renamed as defendants in the indictment in this case, except for Francis Labate and Joseph P. Ballard. As to them, they entered their pleas of guilty in the present case. All other defendants in No. 19132 (with the exception of Leighton B. Dorey, who has maintained his plea of not guilty and has not as yet been tried in that case), entered pleas of guilty to that indictment or to various counts in which each was named. These defendants are Martin Monroe Weiner, William Weiner, Robert D. Lichtman, David H. Stolper and Isaac Sachs. In this case, defendants Francis Jack Kesting, Harry Deering, Harry H. Nonnemacher, Jr. and Maurice H. Chamberland, in addition to Labate and Ballard, entered pleas of guilty to all counts in which each was named.

Each of these persons pleading guilty in one or the other of these two indictments was called as a government witness in the trial of Sussman, Nassau and Spalazzo.

The Facts

The facts of this case generally disclose a pattern of substantial thefts of uniform cloth from the Philadelphia Quartermaster Depot for the period covering January 1950 until sometime in 1952, and then again from February 17, 1954 until March 14, 1956. The actual method of stealing this cloth involved the setting up of shipments of various kinds of uniform cloth by the government-employee conspirators, their notification of the readiness of a shipment to Martin Weiner, the rental of a truck by Martin Weiner, or his younger brother William Weiner, the driving of this truck into the Quartermaster Depot, the loading of the truck by the various participants, the driving away of the stolen load of cloth, the delivery of the load to a shrinking and finishing plant in Philadelphia, and the ultimate sale

of the cloth by Robert D. Lechtman to a jobber in the textile field.

In detailing the facts of the case pertinent to these appeals it is important to note that the first transactions in which either defendants Sussman or Nassau is named or appears is the February 17, 1954 transaction (Count Three of the Indictment; Tr.). As to all events prior to this time (except for some preliminary meetings among Lechtman, Sussman, defendant Harry Ghorney and Nat Suskin, Sussman's partner in the firm Nadan Textile Corporation; and a subsequent meeting early in February 1954), objection was made by counsel for Sussman and Nassau on the ground that it involved a separate conspiracy than that in which these defendants were alleged to have been participants.

The principal government witnesses against Sussman and Nassau were Martin Weiner and Robert D. Lechtman. As a matter of fact they were the only witnesses to give any testimony as to the knowing participation in the alleged conspiracy on the part of petitioners and the only witnesses to give testimony on the various substantive counts that petitioners knowingly received stolen government cloth. Their testimony of this "knowledge" was direct, affirmative testimony, although each differed materially and substantially from the other in their differing versions of the facts of this case. There was no suggestion in the testimony of either of these two witnesses that the "knowledge" of Sussman and Nassau of the stolen character of the government cloth, was in any way "circumstantial"; rather each testified directly that he discussed the fact that this cloth was stolen with each of these two petitioners.

Martin Weiner testified that he started to participate in thefts of government cloth in 1950 (45a); that the arrangements for disposing of this cloth initially were his

responsibility and that of David Stolper (51a); that the plans for stealing the cloth were formulated by David Stolper's mother, since deceased, and one Morris Rosen, also since deceased, with Mrs. Stolper's paper box factory used as a storage place for the stolen cloth until it could be sold (52a). Thereafter both Martin Weiner and Stolper rented trucks and went into the depot to take out loads of stolen cloth. This latter practice commenced in 1951 (53a). Arrangements for obtaining the loads were made with the conspirator employees in the depot (55a-56a). During the period 1951 and 1952, Stolper and Martin Weiner took out approximately 10 loads of stolen cloth in rented trucks, each load consisting of approximately 125 to 190 bolts of cloth, averaging 65 yards to the bolt or piece (61a). For the purpose of disposing of this cloth the name "Myron Wexler" was created and invoices were made in that name for the sale of the cloth (68a). A bank account was opened in the name "Myron Wexler," with Isaac Sachs, one of the defendants in the other indictment and David Stolper's brother-in-law, the person presented to the bank as "Myron Wexler" (63a). Sachs made the deposits in this bank account, and, according to Martin Weiner, the withdrawals as well (69a).

Then sometime in 1952 these parties stopped their stealing activities. Martin Weiner described the reason for the cessation of these activities in the following way:

"*By Mr. Sullivan*:

> Q. Will you tell us why you stopped. A. In 1952 I had a representative from the F. B. I. come to my store in questioning of a Mr. Myron Wexler, and cloth, and scared me to death. I stopped" (72a).

Thereafter the larcenies started again in February 1954 (72a).

Martin Weiner testified that in early 1954 he was approached by Lichtman who told him he had made a connection to sell cloth for export and that they would have nothing to worry about; that if he could get cloth again they would make a lot of money (72a). Thereafter he spoke with Kesting, who was an important official in the Quartermaster Depot, to arrange to resume the stealing (77a); however in the intervening time Lichtman brought Sussman, Chorney and Nat Suskin to his (Martin Weiner's) store on Market Street in Philadelphia. At this meeting, at which Sussman "did all the talking" (220a), Martin Weiner testified that he was "persuaded" to resume stealing by Sussman and Lichtman (226a) because Sussman had a perfect outlet in foreign trade to dispose of the cloth without detection, and that "but for" that persuasion he would not have resumed stealing from the Quartermaster Depot; and thus it was that he was "convinced" that it was "perfectly safe" to start stealing again (77a, 226a).

Shortly thereafter the first transaction involving Sussman occurred, which was the February 17, 1954 theft (Count 3 of the indictment (7a)). Martin Weiner tried to convey the impression that the first load of cloth that he stole after the two-year hiatus in stealing was only after the assurances of safety he received from Lichtman and Sussman (228a). However, he concededly pleaded guilty in Indictment No. 19132 to the receipt of a quantity of stolen Air Force blue cloth on February 12, 1954, with William Weiner, Robert Lichtman and Leighton B. Dorey, being Count 4 of that indictment, at a time prior to the first transaction with Sussman (228a-230a, 879a), and this was the same cloth which Martin Weiner pleaded guilty to stealing with Labate, Ballard, William Weiner and Lichtman on the same date, as set forth in Count 3 of that indictment (878a-879a). Moreover, both Kesting and Deering testified that Martin Weiner stated to them that he had

heard that the men at the Quartermaster Depot were again stealing for David Stolper and he wanted them to steal again for him (358a, 366a, 386a).

Martin Weiner testified that after the stealing was resumed all of the financial transactions with the various purchasers of the cloth were handled by Lichtman (78a, 84a-85a, 185a), until he and Lichtman split up in August 1955, after which time he did his own collecting (79a, 206a-207a). Thus, except for the last few sales, all of the proceeds from the sales of the stolen cloth which he received were received from Lichtman (185a).

Martin Weiner also testified that at the first meeting he had with Sussman, in his store on Market Street, Philadelphia, Nat Suskin, Sussman's partner in Nadan Textile Corporation (220a) was present and participated in the conversation relating to the arrangements for the theft, storage, examination and disposition of the stolen cloth (76a-78a, 81a, 220a); that thereafter when the arrangements were made for the disposal of the stolen cloth, Suskin participated therein (82a-84a), until the time came when Harry Nassau was a participant in place of Suskin (79a, 84a) and that Suskin and Nassau never appeared together (89a). Nassau first appeared in the latter part of 1955, according to Martin Weiner (89a).

Martin Weiner also testified that there was a period from after August 20, 1954 until June 21, 1955, when the thefts continued, when he and Lichtman continued to sell to Sussman, except for one sale to Mr. Stein of New York (202a). However, the indictment in this case shows that from after August 20, 1954 (count 13) until June 21, 1955 (count 19), Sussman did not receive any of the stolen cloth, with thefts occurring (according to the guilty pleas of the thieves) at least on October 8, 1954 (count 14), De-

cember 29, 1954 (count 15), February 2, 1955 (count 16), and April 8, 1955 (count 17) (12a-15a). In the indictment in which he was named as a defendant, Martin Weiner pleaded guilty to participation in the thefts and the receiving on these same dates of the identical amounts of cloth, counts 19, 20, 21, 22, 23, 24, 25 and 26 (886a-890a).

Thus for the period between August 20, 1954 and June 21, 1955 at least, Sussman and Nassau (who is named in counts 11 and 13 at a time when he was not connected with Sussman) did not engage in purchasing any of the stolen cloth and thus in effect they had ceased for that period of time at least to be members of any criminal conspiracy with the other co-conspirators, according to the indictment and the proof.

Following the dissolution of the Myron Wexler account in 1952, Martin Weiner and David Stolper were never again associated together in the thefts of cloth (237a), although each of them had their own separate arrangements for stealing from the Quartermaster Depot. Nevertheless the indictment names them both as members of a single continuing conspiracy. And although David Stolper never met either Sussman or Nassau, and had no part in any transaction involving them, they nevertheless are all named as members of the same single continuing conspiracy (count 1) (4a-7a).

Martin Weiner also testified that he appeared before the Grand Jury for the Eastern District of Pennsylvania on two occasions, January 9, 1957 and January 11, 1957 and on both occasions he gave no testimony, merely pleading his constitutional privilege against self-incrimination (117a-118a).

David Stolper was the next principal witness for the government in this case and his testimony was limited to

matters occurring before the hiatus of 1952-1954 in the thefts from the Quartermaster Depot (314a-316a). Thus Stolper was not permitted to testify to his own conspiracy with these same employees, including Spalazzo, during the period 1953-1955, when he engaged in the same type of thefts as the Weiner brothers (316a, 345a). To insure that this series of thefts would be ruled out of the case, the Court on motion of counsel dismissed various substantive counts relating only to Spalazzo on trial, counts 32, 33, 34, 35, 36, 37, 38, 39 and 40 (345a-347a).

In substance Stolper testified to the commencement of thefts in 1950, to the part played by his mother and Morris Rosen, the method of operation of the thieves and receivers and to the fact that the thefts stopped sometime in 1951 (308a-314a, 321a-324a, 326a). The reason the thefts stopped was that Martin Weiner informed him that the FBI was investigating "Myron Wexler" (327a-328a).

Stolper never met or heard of Sussman, Chorney or Nassau before this case started (325a); and he did not appear as a witness before the grand jury in this case (328a).

Several of the government employee defendants and co-conspirators testified to the "resumption" of stealing for Martin Weiner in 1954 (365a-366a, 386a, 393a, 399a). It was apparent that none of them met, knew or ever heard of Sussman, Nassau or Chorney before this case started (400a).

Robert Lichtman was the only other government witness besides Martin Weiner to testify as to "knowledge" of the stolen character of the cloth on the part of Sussman and Nassau. He was also the last government witness called to testify in this case.

Lichtman described the 1951-1952 transactions in which he was involved as innocent transactions, in so far as he was concerned (646a); that he found out sometime in 1953 that the goods were stolen, after the resumption of the sale of these goods (647a-648a). The first renewed sale of goods, after he had stopped selling for Martin Weiner, was to the Nadan Textile Corporation in the beginning of 1954 (650a). According to Lichtman, it was after the 1954 resumption of the thefts that he first knowingly participated in the sales of stolen government cloth (650a). Martin Weiner had explained to him how the FBI was investigating an American Braid Supply Company and Myron Wexler "and that they were afraid of doing any business and that was the end of any sales from 1952, when that happened, until the middle to the end of 1953. Mr. Weiner came back to me and said the goods are available again providing it is perfectly safe, providing we are paid in cash * * * " (650a). According to Lichtman, Martin Weiner told him that he learned that David Stolper was stealing again and that he (Weiner) went to Kesting to find out if Kesting was willing to steal again for him (713a-714a), which he was and which he did.

Lichtman procured Sussman and Suskin, through his employee Chamberland, and Chamberland's acquaintance, Chorney, to come to Philadelphia to buy goods (651a-654a). There it was that the first meeting was held in Martin Weiner's Market Street store and, according to Lichtman, no mention was made at this meeting of the stolen character of the goods to be purchased by Sussman and Suskin through their firm, Nadan Textile Corporation (656a-658a). This first meeting was pin-pointed at February 12, 1954, a week before the first load of goods purchased by Nadan Textile Corporation (706a).

Considering Martin Weiner's testimony on this point (76a), Lichtman's testimony was as follows:

"Q. Now, at this meeting were Mr. Sussman and Mr. Suskin told that these were stolen goods? A. No, sir, not to my knowledge. I didn't hear them told.

Q. Were you present throughout the conversations that were had? A. Generally I was in the property. I could have been back in the office or up front. Generally I was with them. There was discussion as to how they were buying it, and that Mr. Weiner pays cash and he goes in the Quartermaster for it, but I do not remember them being told that it was stolen, because I remember specifically a year later or so telling them the details, and I can't see why I would have done it then if I knew they knew it earlier" (707a).

Thus there is a direct conflict in the testimony between Martin Weiner and Lichtman on this very point. In response to a question put by the trial judge, Martin Weiner testified as follows:

"*By the Court*:

Q. Let me ask you, Mr. Weiner, was anything said in Mr. Sussman's presence when Mr. Lichtman was there as to the Deering cloth blues, that it had been stolen? A. The whole conversation from the beginning was to convince me to get more cloth again and that it was safe how they would dispose of it. That is why they came, because I didn't have any of the financial or billing dealings. My only job was to take the cloth from the Quartermaster, and he brought them down to convince me—he brought Mr. Sussman and Mr. Suskind and Mr. Chorney was also there—to convince me that they had a safe outlet for the cloth. That was

what we were talking about. That's why they came to the store" (76a).

Lichtman testified that sometime in August 1955 he told Sussman and Nassau about the fact that the goods they were buying were stolen from the Quartermaster Depot (681a), whereupon Sussman ostensibly stated that he knew all about it from Chorney. At this time Lichtman said he "went into detail this time for the first time as I can remember going into details with them as to how the goods were stolen" (681a).

Lichtman testified that after the August 20, 1954 sale to Nadan Textile Corporation he made no further sales to Sussman and Suskin until June 23, 1955, and thus for the intervening period there were no transactions with Nadan Textile Corporation or Aaron Sussman & Co. (672a, 730a). During that period there were sales of this stolen cloth to other persons (739a). None of the other purchasers were told that these goods were stolen (746a).

Lichtman also testified that he did not give any evidence before the grand jury in this district at the time of his only appearance before it (771a); rather he claimed his privilege against self-incrimination. Thus the only witnesses testifying to any "knowledge" on the part of Sussman and Nassau that the goods they purchased were stolen did not give any evidence before the grand jury returning this indictment.

Throughout the trial the name of Nat Suskin continually appeared, particularly in the testimony of Martin Weiner and Lichtman, and in the testimony of the various woolen jobbers and representatives from New York. Suskin, who was not named as a co-defendant or co-conspirator in either this indictment or the prior indictment, No. 19132, was variously described as Sussman's "partner" in Nadan Tex-

tile Corporation (220a, 714a), and that "the only one that had knowledge of woolen goods when we started was Mr. Suskin" (716a). Lichtman said he never told Suskin the goods he was selling to Nadan Textile Corporation were stolen (714a). Weiner had Suskin present at the original meeting in his store and at the delivery points of the goods. Yet Suskin was not called as a witness by the government, although he was under subpoena, along with Sussman, for the trial of the other indictment. See Defendant's Exhibit D23, received in evidence at page 1631 of the trial minutes.

The testimony of Lichtman and the woolen jobbers and representatives from New York corroborate each other and Sussman's own trial testimony, to the effect that the prices at which Nadan Textile Corporation, and later Aaron Sussman & Co. bought and sold the goods in question here were at the then going market prices.

The trial of this case lasted approximately three weeks. Three defendants were on trial: Sussman, Nassau and Spalazzo. There was no connection of any sort between Sussman and Nassau, on the one hand, and Spalazzo, on the other hand. Nor did the government claim any connection between them, except as members of an alleged overall single continuing conspiracy.

After the selection of the jury and before the opening statements of counsel, counsel for Sussman and Nassau moved for a severance of the trial with Spalazzo on the ground "that under the indictment in this case they are charged with what amounts to a multiple conspiracy, and it would not afford them a fair trial if they were tried together" (33a-34a). This motion was denied (36a). From the proof which followed it is clear that this motion should have been granted.

During the course of the trial, and starting with the first government witness, Martin Weiner, these witnesses

were severally asked questions on direct examination which were improper in form, containing language such as, "Why did you do this, or that?"; questions calling for conclusions or rambling self-serving declarations or statements or speeches by these witnesses. Counsel for Sussman and Nassau made continual objections to this type of examination, only to be overruled in each instance. If this occurred only occasionally, then the matter would be harmless or insignificant, but the full scope and breadth of this practice was so great as to constitute prejudicial error. Among the many places where this sort of thing occurred, see pp. 53a, 56a, 58a, 59a, 71a-72a, 109a-110a, 362a, 685a-686a. However the trial judge did, once or twice, sustain objections to the same sort of questions; see e.g. pp. 109a, 311a. When counsel for Spalazzo asked a similar "why" question of his client, the prosecutor objected to the question, which objection was sustained (812a). Counsel for Sussman and Nassau then had the record reflect the difference in treatment afforded this type of question when asked by the prosecutor or when asked by defense counsel on direct examination (813a).

As the trial progressed it became evident that the proof was falling into three or four distinct separate categories of conspiratorial conduct. These were:

1. The 1950-1952 period, when Martin Weiner, Stolper and the government employees stole and sold to the trade. This was the "Myron Wexler" period, ending when the FBI investigation caused Martin Weiner to be "scared" to death (72a). Weiner and Stolper testified that Lichtman knew then he was dealing in stolen goods; Lichtman stated he found out later that these goods were stolen. Every witness agreed that the thefts stopped for approximately two years, until about 1954. When they resumed David Stolper was no longer part of the group.

2. The 1953-1955 period of David Stolper and the same government employees. Stolper had his own business going then since he had split up with Martin Weiner over several reasons. The trial judge recognized this enterprise as a separate independent and co-incidental conspiracy, for he ruled out all proof of it after objection by Sussman and Nassau's counsel (314a-318a).

3. The 1954-1956 period of thefts by Martin Weiner, William Weiner, Lichtman and Chamberland with the same government employees. From this period there should be two divisions, insofar as Sussman and Nassau are concerned:

(a) February 17, 1954 to August 20, 1954, including Sussman and Suskin, but not Nassau, for Nassau did not appear until 1955. Lichtman testified that Sussman did not learn of the stolen character of the goods at the February 12, 1954 meeting; and Chamberland told Chorney about it in the Spring of 1955, from whence Sussman probably learned it, according to Lichtman in his conversation with Sussman in August 1955. This period, when Weiner says Sussman knew the goods were stolen, was a short one, for Sussman and Suskin stopped buying the goods for nearly a year because the price was too high (671a).

(b) June 21, 1955 to March 14, 1956, when Martin Weiner and William Weiner and the government employees stole, with Lichtman in this period only until July 19, 1955, and Sussman and Nassau as purchasers.

The fundamental break in this entire sequence of thefts was the hiatus between 1952 and 1954. Everyone in the case recognized this sharp break or "hiatus" in these criminal activities. The prosecutor referred to it as a

> "short hiatus because of the investigation of Wexler" (315a);

with the trial court stating, in response to a statement by counsel, as follows:

> "Mr. Greenberg: Weiner said there was a definite hiatus between the two.
>
> The Court: You may be right about that, if Mr. Sullivan is wrong as to the stopping of the conspiracy, and another conspiracy, *then all of this evidence should never have been admitted—1950, 1951 and 1952*" (792a). (Emphasis added.)

In view of the way the proof was being received, objections were made steadily to the receipt of this multiple conspiracy proof. But all such objections were overruled by the trial judge.

At the close of the government's case, counsel for Sussman and Nassau moved "to dismiss each and every count of the indictment in which they are named on the ground that there has been no proof by any witness who has appeared and testified for the Government that there was any evidence of any kind or nature whatsoever against them adduced before the grand jury; that therefore the indictment is not founded on such credible evidence which will sustain the finding of an indictment" (815a). In response to this motion the prosecutor stated that there is no necessity to place witnesses on the stand who may have testified before the grand jury (816a). Thereupon the following colloquy took place:

> "Mr. Greenberg: May I ask again that this procedure be followed, that all of the grand jury testimony be submitted to the Court for its determination, and I think that is the proper way to proceed under the circumstances, that is, as to whether or not there was sufficient credible evidence to sustain an indictment before the grand jury.

Mr. Sullivan: There were, as to my knowledge, no notes of testimony of the present indictment. The notes of testimony to which you refer were for the other indictment as far as I know.

Mr. Greenberg: Well, then, at this time, if the Court please, I move to dismiss the indictment on the ground that failure to record testimony of witnesses before the grand jury deprives the defendants Sussman and Nassau of due process as guaranteed by the Fifth Amendment, and more particularly, it is a violation of Rule 6 of the Federal Rules of Criminal Procedure.

The Court: Your motions are denied" (816a-817a).

At the close of the government's case, petitioner Harry D. Nassau rested without offering any proof on his behalf, and thereupon he moved for judgment, which was denied (812a). Then he moved for a severance and requested that his case be submitted to the jury. This motion also was denied (812a).

All motions to dismiss the indictment were renewed at the close of all the proof, which motions also were denied (818a).

Counsel submitted various requests to charge, as directed by the trial judge. These requests or points for charge by the government and by counsel for Sussman and Nassau are set out verbatim at pp. 847a-857a of the Consolidated Appendix for Appellants, and the court's rulings on these requests are set forth at pp. 819a-822a. Following the court's charge to the jury (823a-839a), requests and exceptions to the charge were noted and, as to Sussman and Nassau various requests and exceptions were made, but each was denied (840a-842a).

With respect to the requests to charge made on behalf of Sussman and Nassau, the court made the following ruling adverse to them:

1. Refused as stated: Nos. 7, 9, 12, 15, 21 and 23 (851a-856a; 820a).

2. Refused: 10 and 24 (852a-853a, 856a; 820a).

As to those requests which were refused as stated, they related simply to these defendants' theory of the case and to the general principles of law affecting the jury's ability to consider the evidence. For example, request No. 7 had to do with the purchase of goods for cash as "alone" not being criminal, and thus not evidence to prove that these defendants had actual knowledge that they were purchasing stolen goods (851a); request No. 9 had to do with Sussman's proof that he had co-operated fully with the government to "break" this entire case, thus supplying the witnesses against him, particularly the two Weiner brothers, Stolper and Lichtman "with a motive for their testifying against him," and that the jury "may consider these facts in assessing the credibility of these witnesses and in supplying them with motives for testifying falsely against" him (852a); request No. 15 related to the failure of the government to call Nat Suskin as a witness, as did request No. 26, the *Berger* case statement (295 U. S. 78, 88) (854a, 856a-857a).

As to the requests refused, Nos. 10 and 24, these had to do with these defendants' legal theory of the case, multiple conspiracies (No. 10) (852a-853a) and with the usual statement in judging this case the jury must never consider, "Will the government win or lose the case? The government always wins when justice is done, regardless of whether the verdict be guilty or not guilty" (856a).

Exceptions were granted to these defendants to the failure or refusal of the court to charge as requested (820a). To the extent that the trial court did not charge in the exact language of the requests, and refused particular requests to charge "as stated," counsel invited the court's attention

to the cases of *Sugarman* v. *United States*, 249 U. S. 182 and *United States* v. *Kushner*, 135 F. 2d 668, *cert. den.* 320 U. S. 212. Also, the failure or refusal of the trial court to charge the defendants' theory of the case was called to the court's attention with the citation of *United States* v. *O'Connor*, 237 F. 2d 466 and a quotation from a footnote in that case (821a).

Following the charge to the jury, counsel noted several exceptions to the charge as delivered, but these exceptions were denied (840a-842a). In particular they related to the charge as follows:

1. *The Charge*: "What is a reasonable doubt? It has been defined as an honest doubt that remains with you as to the guilt of a particular defendant after considering all the evidence. It is the kind of doubt that would make you hesitate to act in matters of importance to you in your daily life. It arises from the evidence and must remain after you have had a full consideration of the case. If you have a reasonable doubt, an honest reasonable doubt, after considering all the evidence, the defendants are entitled to the benefit of that doubt and must be acquitted" (829a).

The Exception: "If the Court please, in Your Honor's charge on reasonable doubt, Your Honor said that a reasonable doubt is one which must arise from the evidence. Your Honor failed to charge that a reasonable doubt may arise from the evidence or the lack of evidence, and to the extent that Your Honor did not charge that a reasonable doubt may arise from the lack of evidence, and I particularly refer to the lack of evidence produced by the Government, I except" (840a).

2. The court was requested to charge the jury that they can only find the defendants Nassau and Sussman

guilty of the crime of conspiracy as set forth in pleading paragraph 3 of the indictment, where their alleged conspiratorial conduct is set forth (840a). See p. 5a of the Consolidated Appendix for Appellants.

3. The court failed to charge the jury that these defendants "can only be found guilty of the crime of conspiracy if they did—if the jury find they did that which is alleged in that paragraph and from no other part of the conspiracy count" (840a).

4. Exception was noted to the charge on "circumstantial evidence" on the ground that "there is no circumstantial evidence issue in this case. The evidence given by the witnesses for the Government is direct evidence, and the Court cannot substitute in its charge a theory of circumstantial evidence for the evidence presented by the Government" (841a). There was no request by the government in this case for the court to charge on any theory of circumstantial evidence (847a-848a).

Thereafter the jury convicted all three defendants on trial of each count in which he was named. Post-trial motions were made in accordance with the court's direction (845a).

Post-Trial Motions

After the trial petitioners Sussman and Nassau filed motions for a new trial "in the interest of justice," under Rule 33, Federal Rules of Criminal Procedure, on the ground that their guilt was not established beyond a reasonable doubt as a matter of law; that the verdict of the jury was against the evidence and weight of the evidence; and that the verdict was against the law.

The second branch of these motions was in the nature of a motion in arrest of judgment, under Rule 34, Federal Rules of Criminal Procedure (although not specifically so described). The moving paragraph was "to dismiss the indictment on the ground that said indictment was improperly obtained in violation of the rights of said defendants as guaranteed by Amendment V, of the Constitution of the United States and Rule 6, Federal Rules of Criminal Procedure, in that there was no legal evidence adduced before the Grand Jury finding and returning said indictment" (857a-858a). In his opinion filed in deciding these motions, Judge Lord did not make any reference or statement concerning this second branch.

District Judge Lord wrote an opinion setting forth his reasons for denying petitioners' motions for a new trial (859a-871a). This opinion is reported at 168 F. Supp. 531. The principal portions of this opinion relate to the question of the multiple conspiracy doctrine. In substance, the court held that the "hiatus" (which he recognized as existing) between 1952 and 1954, did not effectually terminate the conspiracy so as to require a severance in the trials of these petitioners and Spalazzo, and that it did not result in the end of one conspiracy and the commencement of a new and separate one. The "hiatus" was characterized as resulting only from "interrupting circumstances" (866a). The voluntary termination of these criminal activities for the two year period was not believed to end the conspiratorial agreement, but rather an inference could be drawn that there was no intention to terminate them. The case of *United States* v. *Russano*, 257 F. 2d 712 (2d Cir., 1958), cited by petitioners, was distinguished by the court as not controlling this case (868a-869a).

Thereafter, petitioners were each sentenced to one year imprisonment and to pay a fine of $1,000. Bail pending appeal was then granted by the district court.

Reasons for Granting the Writ

The reasons for granting the writ of certiorari in this case fundamentally relates to the doctrine of multiple conspiracies, the orderliness of federal grand jury procedure and the guarantee that defendants charged with federal criminal offenses receive a fair trial, under the supervisory function exercised by this Court over the administration of federal criminal justice. *Bruno* v. *United States*, 308 U. S. 287; *McNabb* v. *United States*, 318 U. S. 332; *Marshall* v. *United States*, 360 U. S. 310.

1. There was a material and prejudicial variance between the indictment which alleged a single continuous conspiracy and the proof showing multiple conspiracies. The decision in this case conflicts with the decision of the Court of Appeals for the Second Circuit in the case of *United States* v. *Russano*, 257 F. 2d 712. This is the principal argument submitted by petitioners, that upon the proof of record the evidence showed the existence of multiple conspiracies, thereby materially varying from the indictment which alleged only a single continuous conspiracy. The state of the record on this question is clear: all parties connected with the case substantially agree on the underlying factual pattern to the effect that there was a definite break or hiatus in the criminal conduct of some of the alleged conspirators, and that sometime later a new course of criminal conduct was undertaken.

To review again and simplify the factual pattern of this case, attention is invited to the testimony of the government witnesses Martin Weiner, Stolper, Deering and Kesting. They each testified in substance that the thefts of government cloth ceased in 1952 (or late 1951) at the time the F.B.I. was investigating the "Myron Wexler" account. Martin Weiner put it most vividly:

"In 1952 I had a representative from the F.B.I. come to my store in questioning of a Mr. Myron Wexler, and cloth. and scared me to death. I stopped" (72a).

This was stated on *direct* government examination.

It matters little whether this "stopping" was voluntary or involuntary. The plain fact is that all concerned abandoned the conspiracy in which they were then engaged. That is as full and final a halt to the then existing criminal conspiracy as if they never again engaged in these activities. This is the teaching of the case of *United States* v. *Russano*, 257 F. 2d 712 (C. A. 2d, 1958, opinion by Circuit Judge Waterman). See also, Note, *Federal Treatment of Multiple Conspiracies*, 57 Columbia Law Review 387 (1957).

In the *Russano* case the only distinguishing difference from the case at bar is the fact that there the time-break, or hiatus, resulted from the arrests of several of the co-conspirators, while here the hiatus resulted from the co-conspirators being frightened by an F.B.I. investigation. If this distinction is vital, then this case need proceed no further on this point; but this truly is a distinction without a difference, for the plain facts are that in both cases the criminal activities did come to a complete stop—to an end. The subsequent resumption of activities was in an entirely new operation, with new participants and at least one of the former central figures eliminated.

The government in the *Russano* case, and here too, relied heavily on the dictum in the case of *United States* v. *Perlstein*, 126 F. 2d 789, 798 (C. A. 3d, 1942), *cert. den.*, 316 U. S. 678, to the effect that "once a conspiracy is proved it must be deemed to continue until the contrary is established."* This statement cannot withstand the test of an-

*Judge Lord in his post-trial opinion relied upon cases other than the *Perlstein* case for the same proposition, cast however in

alysis, for it does not add anything to our understanding of the factual scope of a conspiratorial agreement. For the purposes of statutes of limitation, at least, a conspiracy ends with the commission of the last overt act proved to be in furtherance of the conspiracy. *Krulewitch* v. *United States*, 336 U. S. 440; *Grunewald* v. *United States*, 353 U. S. 391; *Lutwak* v. *United States*, 344 U. S. 604. There is no unlimited continuity of a criminal conspiracy, falling off ultimately into solar space like a missile or rocket. Here the proof by the government witnesses clearly shows a complete definite intentional stop in the activities. As Judge Waterman points out in the *Russano* case:

> "In the present case there is not only an absence of evidence indicating a continuing conspiracy, but also an absence of evidence indicating that these two appellants were members of any conspiracy that was in existence during 1953 and 1954" (257 F. 2d 712, 716).

Thus *evidence* is required to prove the continued existence of a conspiracy, not a *presumption* or a *deeming*. Here the evidence, the government's direct evidence, is to the effect of a complete stop or break in the activities. The fact that the principal conspirators, Martin Weiner or Lichtman (depending on whose version you accept or believe) were merely biding their time to start the activities going again is not evidence of continued activities. This theory is to be compared with the government's theory of an "implied conspiracy to conceal the main conspiracy" which the Supreme Court rejected in the *Krulewitch* case, *supra*, and forever laid to rest in the *Grunewald* case, *supra*.

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the terms of a "presumption" of continuity, citing *Hyde* v. *United States*, 225 U. S. 347; *Miller* v. *United States*, 277 Fed. 721 and *Marino* v. *United States*, 91 F. 2d 691 (865a [168 F. Supp. 531, 535]). However any "presumption" must give way to facts which here exist to show a definite break in activities continuing over a long period of time.

There are various approaches one may take to the analysis of the multiple conspiracies in this case, but this need not be undertaken here, for the plain facts are that the proof received here of the activities of the year 1950-1952 prejudiced these appellants in the trial of this case. The trial judge himself recognized this fact (792a). *Kotteakos* v. *United States*, 328 U. S. 750. There the Supreme Court held, in a somewhat different type of multiple conspiracy case, that the proof "admittedly" made out a case, not of a single conspiracy, but of several, notwithstanding one was charged in the indictment." (328 U. S. 750, 755.) Here the conspiratorial activities after the resumption of the stealing were in two separate and distinct parts, Stolper's and Weiner's. Both were offshoots of one original scheme. The trial judge ruled Stolper's activities with the same government employees to be a separate venture; but that the Weiner, Lichtman and petitioners' venture to be a continuation of the original 1950-1952 plan, with petitioners joining the existing group in 1954. Why such ruling was made is not explained. Why was not Stolper's group considered the continuation of the original scheme and the group that petitioners joined considered the *new* enterprise? One choice is as good as the other, and both are in this respect equal.

It is submitted that under the facts of record here the variance between the indictment alleging a single continuing conspiracy and the proof of multiple conspiracies was material and prejudicial. *Berger* v. *United States*, 295 U. S. 78, *Kotteakos* v. *United States*, *supra*, *United States* v. *Russano*, *supra*.

Here too the government's original theory was that Stolper's own activities with the government employees during 1953-55 was part of a single conspiracy, notwithstanding the absence of any connection between Stolper and Weiner and the others during this time. Persistent objections by counsel for these appellants finally led the trial judge to agree to this point and the separate Stolper conspiracy was ruled out of the case (314a-318a).

The Court of Appeals disposed of petitioners' arguments on this and all other points, except the grand jury point, *infra*, by referring only to District Judge Lord's opinion in the District Court.[1]

2. The failure to record and transcribe the grand jury proceedings resulting in this indictment was prejudicial to petitioners' rights, in light of the fact that none of the government witnesses gave evidence before the grand jury. The failure to raise this question by pre-trial motion did not constitute a waiver thereof, in light of the decision of this Court in *Costello* v. *United States*, 350 U. S. 359, and the opinion of Judge Learned Hand in the *Costello* case in the Court of Appeals for the Second Circuit, 221 F. 2d 668, 677. The treatment of this issue by the Court of Appeals in this case appears to be an evasion of the underlying problem of the requirements that the testimony of all grand jury witnesses be recorded and preserved, so that defendants charged with federal crimes may be assured that their prosecutions are based upon evidence which "rationally establish the facts" (221 F. 2d 668, 677). Since there is a valid presumption of regularity as to grand jury proceedings, these petitioners could not have determined by pre-trial proceedings whether there was any evidence at all before the grand jury warranting the return of the indictment against them. Orfield, *The Federal Grand Jury*, 22 F. R. D., 343, 405-408, 449-450 (1958). It was only after inquiry of the witnesses who testified against the petitioners as to their grand jury testimony, that it could be determined

[1] Chief Judge Biggs stated that five of the six issues raised by appellants "were dealt with most competently and disposed of correctly" in the thoughtful opinion of Judge Lord. However, a reading of Judge Lord's opinion discloses that he only dealt with the issue of multiple conspiracy and the contradictory testimony of the government's proof concerning it. No attempt was made by him to answer the various contentions raised on appeal in the court below.

that there was in fact no credible evidence before the grand jury, that the attack upon the indictment in this fashion could be made. This was the teaching of Judge Hand in his opinion, aforesaid, as utilized by counsel here. The Court of Appeals treated the failure to move in advance of trial, under Rule 12(b)(2), F. R. Cr. P. as a waiver of the point. It is submitted that this treatment of the case hardly comports with a proper judicial inquiry into the real and essential question of law on this point raised in both lower courts.

It is undisputed that there were "no notes of testimony" (816a) taken during the grand jury proceedings held in connection with this case. It is appellants' contention that the failure to employ a grand jury stenographer to have the grand jury witnesses' testimony reported and transcribed deprives them of fundamental due process and a fair trial within the guarantees of Amendment V of the United States Constitution and is a direct violation of Rule 6, Federal Rules of Criminal Procedure.

In *Holt* v. *United States*, 218 U. S. 245, this Court, speaking through Justice Holmes, sustained an indictment based in part on incompetent evidence before the grand jury. Thereafter in *Costello* v. *United States*, 350 U. S. 359, the Court sustained an indictment based wholly on hearsay before the grand jury. However, the Court did not there state that grand juries may return indictments against persons suspected of criminal conduct without any evidence of wrongdoing. As Justice Burton set forth in his concurring opinion in *Costello*, an indictment remains open to attack if there is no grand jury evidence to sustain it:

> "Likewise, it seems to me that if it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment, that indictment should be quashed. To hold a person to answer such an empty indictment for a capital

> or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen." (350 U. S. 359, 364.)

In his opinion Justice Burton referred to the opinion of Judge Learned Hand in the Court of Appeals below, where Judge Hand wrote:

> "if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicated." (221 F. 2d 668, 677.)

Judge Hand in his opinion set forth the proper procedure for attacking the indictment on grand jury grounds, a course adopted and followed by counsel here (815a-816a). See also Judge Frank's concurring opinion in the *Costello* case, and the law review articles, Note, *Quashing Federal Indictments Returned Upon Incompetent Evidence*, 62 Harvard Law Review 111 (1948); Note, *Validity of Federal Indictments and Warrants Based on Hearsay Evidence*, 65 Yale Law Journal 390 (1956).

Since the government witnesses testifying in this case as to the direct knowledge by Sussman and Nassau that the goods they were purchasing were stolen, being Martin Weiner and Lichtman, each stated he did not testify before the grand jury, except to claim his privilege against self-incrimination, then it was imperative for counsel to determine what, if any, proof there was before the grand jury returning this indictment. When the prosecutor stated "no notes of testimony" were taken before this grand jury, this defense inquiry was thwarted and forestalled.

It is respectfully submitted that the failure to record the grand jury proceedings in this situation constitutes prejudicial error, requiring the quashing of this indict-

ment, *Brady* v. *United States*, 24 F. 2d 405, 408; *Nanfito* v. *United States*, 20 F. 2d 376, 378; cf. *United States* v. *Texeira*, 162 F. 2d 169, 170; *Cox* v. *Vaught*, 52 F. 2d 562; *United States* v. *Wolvich*, 127 Fed. Supp. 215.

It is further submitted that the failure to record and transcribe grand jury testimony of witnesses is a violation of the provisions of Rule 6 (d) and (e), Federal Rules of Criminal Procedure, since that rule requires all grand jury proceedings to be recorded and transcribed. Failure to do so violates the procedure for testing such proceedings, as was accomplished in the *Costello* case, *supra;* and also constitutes an evasion of the rule of *Jencks* v. *United States*, 353 U. S. 657, since such technique or practice prevents defense counsel from testing whether a trial witness who appeared before the grand jury gave any evidence that rationally established the facts. *United States* v. *Costello*, 221 F. 2d 668, 677.

In the *Jencks* case, *supra*, this Court held that during a criminal trial a defendant is entitled to the production of reports made by a witness for his inspection to decide whether to use them in his defense (pp. 668-669): "Justice requires no less." In *Pittsburgh Plate Glass Company* v. *United States*, 360 U. S. 395 (1959), this Court held that grand jury minutes were not covered by the Jencks Act, Title 18, United States Code, Section 3500, adopted September 2, 1957 (Public Law 85-269, 71 Stat. 595), stating that Rule 6, F. R. Cr. P. controlled. The test of an indictment must then be based upon the proceedings underlying it. Where those proceedings through failure to utilize a stenographer, are not preserved, the testing process becomes thwarted and forestalled. It is the failure to record and transcribe the grand jury testimony that is here attacked.

It is of no consequence that grand jury proceedings are traditionally secret, for the veil of secrecy should be lifted

in the interests of justice, *United States* v. *Rose*, 215 F. 2d 617, 628-630 (C. A. 3rd), citing and relying upon *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 234, and *United States* v. *Remington*, 191 F. 2d 246, 250 (C. A. 2d), cert. den. 343 U. S. 907. Although the *Rose* case expressly limited grand jury disclosures to a defendant's own testimony before the grand jury in a perjury case, nevertheless the growth and transformation of the law in this area may require full disclosure of the grand jury testimony of trial witnesses as within the *Jencks* case, *supra*, as supplemented by the *Pittsburgh Plate Glass* case, *supra*.

The only fundamental argument facing appellants' contention is the belief that there is no requirement for a stenographic record and transcript of grand jury proceedings. Such argument finds support in only two reported cases since the adoption and effective date of the Federal Rules of Criminal Procedure in 1946. These are the cases of *United States* v. *Martel*, 17 F. R. D. 326, opinion by District Judge Brennan, in the District Court for the Northern District of New York in 1954; and *United States* v. *Carr*, 21 F. R. D. 7, 9. Without citing any authority therefor, Judge Brennan in the *Martel* case stated:

> "It follows that there is no constitutional or statutory right of the moving parties to have a stenographer take or transcribe the testimony of witnesses before the grand jury" (17 F. R. D. 326, 329).[3]

Judge Brennan then cited the statutory requirement in New York making such grand jury transcriptions mandatory, New York Code of Criminal Procedure, Section 952-p, etc. See especially Section 952-t, thereof. He also cited *United States* v. *Oleg*, 21 F. Supp. 281 (D. C. E. D. N. Y.,

[3] Appeal dismissed, 222 F. 2d 369, for want of jurisdiction, as an appeal from a non-final order.

1937) and *United States* v. *Weathers*, 21 F. Supp. 763 (D. C. N. D. Ga., 1937), cases decided before the new Federal Rules of Criminal Procedure were promulgated and made effective.

In the *Oleg* case, *supra*, a pre-trial motion was made for inspection of grand-jury minutes (among other things). On the basis of an affidavit from the assistant United States attorney in charge of the case that there was no stenographer present and no record of the grand jury testimony of the witnesses, the relief was not granted. There was no discussion or reasoning of the court's decision in this regard.

In the *Weathers* case, *supra*, the usual attack was made against the indictment for the presence of an unauthorized person (the grand jury stenographer) in the grand jury room. The district judge denied the motion to dismiss the indictment, stating that it would appear to be

> "conducive to more even justice that the testimony of grand jury witnesses be recorded for the knowledge of the witness that his words may thereafter appear against him is calculated to produce the truth from his lips and it is conceivably of benefit to the accused and the witnesses as well" (21 F. Supp. 763, 765).

There are no appellate decisions on the question of whether it is mandatory or permissive only that recordation and transcription of grand jury proceedings be had. District Judge Stephen W. Brennan suggests that this problem be one addressed to Congress and that "the requirement for same must be based in the statute" (*United States* v. *Martel*, *supra*, p. 329).

It is respectfully submitted that such requirement is to be found within the language, as well as the intent, of the Federal Rules of Criminal Procedure. Since these rules have the force of law, having been prescribed by two acts of

Congress (Act of June 29, 1940, c. 445, 54 Stat. 688, as amended and Act of June 25, 1948, c. 645, 62 Stat. 846, as amended), now appearing in Title 18, United States Code, Section 3771, and having been promulgated and made effective by direction of the Supreme Court, their authority is undoubted. Rule 6 of these rules clearly and definitely describes the scope and purpose of the grand jury and of the law respecting matters related to it.

Rule 6(d) states who may be present before the grand jury, and enumerates them as follows:

> "Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer may be present while the grand jury is in session."

It is clear that this enumeration of persons permitted to be present includes those who are likely to be present only when needed. The use of the expression "may be present" immediately after the word "stenographer" is not a limitation on the word "stenographer" making the stenographer's appearance permissive rather than mandatory. "May be present" includes all the enumerated classes of persons, the attorneys for the government, the witnesses, the interpreters and the stenographers. These persons may be present when their duties require it.

The purpose of the stenographer's presence is indicated as being

> "for the purpose of taking the evidence."

It does not say the stenographer *may* take the evidence; nor does it say the stenographer *shall* take the evidence. It says simply that the purpose of having the stenographer present is to take the evidence. If this purpose may be dispensed with at the election or option of the attorneys

for the government, why provide for the "purpose of taking the evidence"? If the purpose be optional or for selected cases only, the rule should so state. Such claim of no requirement to take the evidence before the grand jury does violence to the whole intent of the rule. If the simple expedient of not having the grand jury stenographer present enables the government to present improper evidence before grand juries for the return of indictments, then the whole purpose of the grand jury is undermined. For then no possible investigation of the correctness of grand jury proceedings may be undertaken in accordance with Rule 6(e), and this branch of Rule 6 is likewise nullified.

Clearly the purpose of taking the evidence enjoined upon the stenographer is a mandatory requirement. In this high-speed technological world of ours there is no real or practical reason for *not* taking the grand jury testimony of witnesses. The government's reasons for not doing so may be based upon considerations of its view that a particular case is not important; but every criminal case is vital to the defendant, where, as here, the petitioners' liberty and property are to be taken from them.

Since Rule 6(e) authorizes the disclosure of matters occurring before the grand jury when directed by the court "in connection with a judicial proceeding," the failure to make a stenographic record of these matters effectively nullifies this rule. It is no answer to say that one of the jurors may be called to testify as to his recollection of what took place, since, as here, the grand jury proceedings may have been held many months before the trial. Clearly what is required to effectuate Rule 6(e) is a stenographic transcript of the grand jury proceedings. The failure to have such record and transcript is, under the circumstances of this case, prejudicial error. Rule 52(b), Federal Rules of Criminal Procedure.

The Court of Appeals should have faced this issue and considered it on the merits. The importance of the question is not to be minimized by the failure of the courts to have considered this question on the merits.

3. The evidence of appellant's guilt was not legally sufficient, since the two principal government witnesses contradicted each other on direct material matters. A theory of circumstantial evidence not advanced by the Government should not be permitted to sustain the Government's case.

The record of the trial clearly discloses the direct contradiction in the testimony of the two principal government witnesses against these appellants, Martin Weiner and Lichtman. In this petition, *supra*, pp. 18-19, there is set forth only one important phase of that direct contradictory evidence. Moreover each of these witnesses is an admitted liar, thief and corrupter of others. Martin Weiner concededly corrupted his younger brother, William, and Lichtman corrupted Chamberland. The record is clear on that point. These witnesses also had a personal grievance against Sussman because of his cooperation with the government in the case against them. (See e.g. pp. 257a-258a, where Martin Weiner expostulated that he had "no personal grievance" against Spalazzo, thereby indicating his feelings against Sussman and Nassau.)

Since two completely variable stories are told by these witnesses, the government's position must perforce be that the jury is free to pick and choose from among these versions that which it wishes or chooses to believe. Such theory can only result in conjecture or guesswork on the part of the jury—allowing the atmosphere of the trial to govern their deliberations. It is to be remembered that the loss suffered by the government in stolen cloth was several millions of dollars, throughout the entire period of the thefts.

The question before the jury was simply: did Sussman and Nassau know the cloth they were purchasing was stolen? Everything hinges on this knowledge. There is no denial by these petitioners as to the various purchases they made, for it was Mr. Sussman who supplied the evidence of the purchases to enable the government to make its case both in indictment No. 19132 and here. See pp. 172a-177a, and especially pp. 175a and 177a of the Consolidated Appendix. Thus this question of knowledge, based upon *direct* evidence by the two witnesses supplying the *facts* of this knowledge, is the crucial question in the case. And it is at this precise point that the main contradiction comes: how this knowledge was conveyed to each of the petitioners.

Since the evidence is so contradictory on this point, it is submitted that the finding of guilt on all counts is not supported by valid and legal evidence authorizing such verdict. Nor can a theory of circumstantial evidence be supplied to overcome this deficiency in the proof. There was no circumstantial evidence case here, in so far as the government's theory is concerned, for they made no requests to charge on this point. The gratuitous supply of such theory by the trial judge was unwarranted and erroneous. Specific exception was taken to this portion of the charge as delivered (841a).

This is not to say that the government may not present alternative theories of proof to the jury, or that they are bound by only one theory of their case, for that surely is not the law. *United States* v. *Klein*, 247 F. 2d 908, 917 (C. A. 2d (1957)) *cert. den.*, 355 U. S. 924. The argument here is that the government's *proof* (self-contradictory though it is) was to the effect that there was *direct knowledge* on the part of petitioners as to the stolen character of the cloth they purchased. Since this is the critical ques-

tion in the case the district court cannot on its own motion supply a theory of circumstantial evidence as though that existed in the case. Unlike the *Klein* case, *supra*, the government here did not rely on any theory of circumstantial evidence which might have supplied the answers to the contradictions in the testimony of Martin Weiner and Lichtman.

Accordingly, since the verdict of the jury here is based upon materially inconsistent sets of facts, these inconsistencies should not be allowed to control the disposition of this case, especially in light of all the circumstances presented.

4. Other matters complained of in connection with this case materially prejudiced petitioners in their right to a fair trial.

The denial of petitioners' motions for a severance and for pre-trial relief was materially prejudicial to their rights. Petitioners moved in advance of trial for various relief. The failure of the district court to grant the pre-trial motions for a bill of particulars and for discovery and inspection was clearly erroneous. See *United States* v. *O'Connor*, 237 F. 2d 466, 475-476, and cases cited therein. These rules (Rules 7(f) and 16, F. R. Cr. P.) are required to be liberally construed or interpreted to carry out the purpose of enabling the accused to meet the charges presented against them, *Bowman Dairy Co.* v. *United States*, 341 U. S. 214; *Freyer* v. *United States*, 207 F. 2d 134, cert. den. 346 U. S. 885.

One of the motions made in advance of trial was to dismiss the conspiracy count, under Rule 12(b)(2), F. R. Cr. P. "on the ground that said count is improper and unlawful in said indictment, in that it constitutes an improper and unlawful pleading by the fragmentation, division and separation of a single conspiracy being charged

in two separate indictments in this court, to wit, this indictment and Count J of Indictment No. 19132 filed February 21, 1957" (28a).

The government has not contended that the second indictment charging this conspiracy, that is to say, this one, is a superseding indictment. The parties charged, the allegations, and all the knowledgeable facts surrounding these two counts indicate that they are part of the same transaction or set of transactions. Hence this present conspiracy count constitutes a fragmentation of one count into two for the purpose of prosecution. *United States* v. *Cohen*, 197 F. 2d 26, 29 (C. A. 3d, 1952, Kalodner, *C.J.*). In the *Cohen* case, Judge Kalodner wrote:

> "While a prosecution for one conspiracy is no bar to a prosecution for participation in another, a single conspiracy cannot be split up for the purpose of prosecution. United States v. Owen, D. C. N. D. Ill., 1927, 21 F. 2d 868; 22 C. J. S. Criminal Law §288."

See also, *Braverman* v. *United States*, 317 U. S. 49 (1942) and *United States* v. *Mazzochi*, 75 F. 2d 497 (1935).

The denial of the motion for a severance of trial from Spalazzo, made on behalf of these appellants at the opening of this trial, was also prejudicial error, in light of all that transpired subsequently.

The Trial Judge's charge to the jury was not fair and correct, after petitioners' requests to charge on material matters was denied and after their exceptions to portions of the charge were noted, without appropriate correction.

The analysis of the charge is set forth *supra*, pp. 26-27. The errors in the charge are highlighted by the charge on "reasonable doubt" where the jury was instructed that a reasonable doubt "arises from the evidence" (829a). Coun-

sel requested the court to charge that a reasonable doubt may arise from the "lack of evidence, and I particularly refer to the lack of evidence produced by the Government" (840a), referring to the failure to call Nat Suskin as a witness here.

In the case of *Holland* v. *United States*, 209 F. 2d 516, 523 (C. A. 10th, 1954, Murrah, *C.J.*), affirmed 348 U. S. 121, and approved on this point at p. 140), the court stated that "a proper definition of the term (reasonable doubt) does not depend upon the observance of a ritual or the use of precise words found in some accepted definition," then continuing:

> "It is sufficient if the jury is given to understand that reasonable doubt as applied to the measure of its persuasion means a real or substantial doubt generated by the evidence *or a lack of it;* and that beyond a reasonable doubt means to a reasonable or moral certainty." (Emphasis added.)

citing 9 Wigmore, *Evidence* (3rd ed., 1940), Sec. 2497.

Exception was also noted to the charge on "circumstantial evidence" (841a) on the ground that there was no such issue in this case. See p. 27, *supra*.

The practice of the trial judge in permitting government witnesses on direct examination to testify to conclusions and to give self-serving reasons for their actions, deprived petitioners of a fair trial. Normally the conduct of a trial in the federal system rests within the sound discretion of the trial judge, the exercise of which should not be lightly upset on appellate review. But the type of testimony offered here, especially by the witness Martin Weiner, was such as to require a firm judicial hand to insure that he did not stray, wander and circumlocute. Actually, that is what he and Lichtman both did, without any restraint

by the trial judge and actually with his acquiescence, approval and encouragement.

Under the circumstances, then, strong strictures on this practice should be set by this Court, in the exercise of its function of supervision over the lower federal courts within its jurisdiction.

CONCLUSION

For all of the foregoing reasons, this petition for writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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October 2, 1959.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,818

UNITED STATES OF AMERICA

—v.—

FRANCIS LABATE, JOSEPH P. BALLARD, FRANCIS JACK KESTING, HARRY DEERING, HARRY H. NONNEMACKER, JR., AARON SUSSMAN, HARRY NASSAU, MAURICE HERBERT CHAMBERLAND, HARRY CHORNEY, CHARLES F. SPALAZZO

AARON SUSSMAN,

Appellant.

No. 12,819

UNITED STATES OF AMERICA

—v.—

FRANCIS LABATE, JOSEPH P. BALLARD, FRANCIS JACK KESTING, HARRY DEERING, HARRY H. NONNEMACKER, JR., AARON SUSSMAN, HARRY NASSAU, MAURICE HERBERT CHAMBERLAND, HARRY CHORNEY, CHARLES F. SPALAZZO

HARRY D. NASSAU,

Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued May 26, 1959

Before BIGGS, *Chief Judge*, and KALODNER and STALEY, *Circuit Judges*.

OPINION OF THE COURT

(Filed August 21, 1959)

By Biggs, *Chief Judge.*

These appeals can be disposed of in one opinion since they involve the same criminal proceedings in the court below. The defendants-appellants have raised six issues, any one of which they assert, furnishes an adequate basis for a new trial. Five of these issues were dealt with most competently and disposed of correctly contrary to the appellants' assertions in the thoughtful opinion of Judge Lord in the court below, 168 F. Supp. 531 (1958), and need not be discussed here.

The appellants as their sixth point for reversal allege that there was a failure to record and transcribe the grand jury proceedings resulting in the indictment and that this was prejudicial to the appellants' rights under the Fifth Amendment in the light of a further allegation made by them that none of the witnesses for the United States at the trial gave evidence against the appellants before the grand jury. The indictment charged the appellants and others with stealing and receiving property stolen from the United States. The appellants' position in this regard is best set out by quoting from their brief. The brief states: "Since the government witnesses testifying in this case as to the direct knowledge by Sussman and Nassau that the goods they were purchasing were stolen, Martin Weiner and Lichtman, each stated he did not testify before the grand jury, except to claim his privilege against self-incrimination, then it was imperative for counsel to determine what, if any, proof there was before the grand jury returning this indictment. When the prosecutor stated 'no notes of testimony' were taken before this grand jury, this defense inquiry was thwarted and forestalled."

We will accept as a "fact," for the purposes of these appeals only, that there was no reporter present at the proceedings before the grand jury and that there is and can be no stenographic transcription of those proceedings.[1]

Rule 12(b)(2), Fed. R. Crim. Proc., 18 U. S. C., provides that defenses and objections based on defects in the institution of the prosecution or in the indictment, other than that the indictment fails to show jurisdiction in the court or fails to charge an offense, may be raised only by motion before trial, and also that the failure to make such motion constitutes a waiver of the defense. The same rule provides as well that the trial court may grant relief from the waiver for cause shown. The appellants failed to make any motion pursuant to Rule 12(b)(2). Cf. Costello v. United States, 350 U. S. 359, 360 (1956). Had they done so, the trial judge could have inquired into this issue and an adequate record could have been made. Absent such a record the appellants seek to have us reach the question of inadequate evidence as a basis for the grand jury presentment against them with no proof in the record that such was indeed the case.

[1] There is no evidence in the record that the testimony before the grand jury was not taken or transcribed. The appellants rely on statements made by the Assistant United States Attorney during the trial as set out in the transcript of the proceedings. In respect to the question as to whether any witnesses who appeared before the grand jury also testified at the trial, the Assistant United States Attorney stated: "Of my own knowledge I can't say whether any of them appeared. I can say that no record was made of their testimony if they did appear. So I doubt very much if any of them did." The Assistant United States Attorney also stated: "I do not believe they testified at all, Your Honor, but I am sure there were people who testified whose testimony was not taken down. I am not sure, but I certainly assume there were, because ordinarily we do not bother the court reporters for every little bit of testimony before the grand jury. They would never get their work done in court." The Assistant United States Attorney also stated: "There were, as to my knowledge, no notes of testimony of the present indictment."

It is not clear from the foregoing whether the Assistant United States Attorney was speaking of his own personal knowledge as to what transpired before the grand jury.

The absence of grand jury testimony is attempted to be employed by the appellants as an auxiliary, as a kind of oblique lever, to endeavour to demonstrate in the present proceedings that they were indicted on insufficient or incompetent evidence. This they cannot do. In Costello, *supra*, 363, 364, the Supreme Court held that an indictment based on hearsay evidence was valid and that it would not establish a rule permitting defendants in criminal cases to challenge indictments on the ground that they are not supported by adequate or competent evidence.[2] We would not change this salutary ruling even if we could do so.

There is no showing or even allegation that the grand jury was not constituted properly or had no evidence before it.

No constitutional issue lurks in the present record. The judgments of conviction will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[2] The extent, if any, that Rule 12(b)(2) is modified by the Costello opinion is not before us.